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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

MERWIN D. BIRCH, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The Court of Appeals did not render an opinion. A copy of the order affirming the judgment of conviction appears in Appendix hereto. No opinion was rendered by the District Court for the Eastern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 13, 1972. A timely petition for an extension of time to file a petition for Writ of Certiorari was granted on July 12, 1972 extending time until August 12, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether a warning given pursuant to a search warrant, which warning failed to inform petitioner that the warrant could only be executed at that time with his consent, denied petitioner his right to be free from unreasonable search and seizures under the Fourth Amendment to the United States Constitution.

2. Whether a person, who after being warned, affirmatively states that he does not want to waive any rights and is then, in spite of this, subjected to additional interrogation during which he makes various statements can be said to have affirmatively waived his rights.

3. Whether the facts in this case establish probable cause for an arrest.

4. Whether a grand jury indictment based on testimony of a single witness who misleads the grand jury by not telling it that he is merely relating hearsay testimony and did not make the observation claimed, effectively denies petitioner his 5th Amendment right to be indicted by a grand jury, injures the integrity of the judicial process and should be dismissed.

5. Whether highly prejudicial collateral evidence may be received without a precautionary instruction to the jury.

6. Whether when the prosecution in a bill of particulars limits itself to proving a direct hand-to-hand transfer and throughout the proceedings relies entirely on evidence of direct observations of this "transfer," a circumstantial evidence instruction allows the jury to avoid the issue in the case.

STATEMENT OF THE CASE

On December 18, 1970, agents of the Federal Bureau of Narcotics and Dangerous Drugs, pursuant to an administrative warrant, conducted an audit of depressant and stimulant drugs of the Four Corners Pharmacy (hereinafter referred to as Four Corners). Petitioner Merwin D. Birch was vice-president of Four Corners and was in charge of the records for drugs purchased, dispensed, and on hand. Upon presenting the warrant to Petitioner, an agent read him a warning from form B.N.D.D. 13-A but neglected to inform petitioner that he could refuse to turn over his records at that time. Petitioner was asked if he would waive his rights and he affirmatively replied that he would not waive his rights. The agents, however, continued to question petitioner, eliciting several statements from him.

As a result of this audit, a surveillance of Four Corners and Petitioner was begun. On January 27, 1971, agents Lore and O'Grady went to Wolman's Pharmaceutical Corporation in Melville, New York where they secretly marked bottles of drugs which were to be used to fill an order from Four Corners. The Order was then packed by Wolman's and given to the agents who took it back to their New York office. For purposes of later identification, the package was shown to other agents on the case. Thereafter, agents delivered the

package to the United States Parcel Service terminal on Staten Island for shipment to Four Corners.

On January 28, 1971, Birch was observed to take a box which bore the marking "Wolman's" from Four Corners and place it in the rear seat of his car and then drive to his residence. Upon pulling into his driveway, an agent observed Birch's son take a box out of the back seat and bring it into the garage.

On January 29, 1971, Agent Scott observed Birch inside his garage handling some cylindrical objects similar in size to the bottles used by wholesale drug houses. Scott could not see where Birch obtained the bottles from nor could he see Birch actively hand them to another man who was present in the garage. Scott did see this other man handling these objects and placing them in a box. Agent Scott then left and saw nothing else.

During this time, Agent Klein was observing the same scene through a 600 millimeter camera lens from a nearby house. However, Agent Klein was not able to identify Birch. Klein saw the other man place the box in his car and drive off. This man was immediately arrested and the box was seized containing the previously marked bottles which contained capsules of depressant and stimulation drugs. Petitioner was then arrested.

Petitioner Birch offered as his defense three witnesses who stated that Birch was asleep in his house during the time the agents claim to have observed the objects being transferred.

Petitioner Birch was convicted by a jury on July 28, 1971 of Count 1 of an indictment which stated:

COUNT ONE

On or about the 29th day of January 1971, the defendant Merwin D. Birch, a person not acting in the ordinary and authorized course of his business as required by Title 21, United States Code § 360a(b)(1), at Staten Island, within the Eastern District of New York, delivered and otherwise disposed of approximately 17,000 capsules of amobarbital, secobarbital, dextro amphetamine, dextro amphetamine sulfate, pentobarbital, and various combinations of the above, as defined by Title 21 United States Code § 321(v), in violation of 21 United States Code § 360a(b).

Petitioner Birch was sentenced on February 10, 1972, to confinement for three years under 18 U.S.C. § 4208(a)(2) and was fined $2,500. On appeal of this judgment to the Second Circuit, his conviction was affirmed without opinion on June 13, 1972.

REASONS FOR GRANTING THE WRIT

This entire proceeding is replete with reversible error; starting with the initial execution of the search warrant, in the determination of probable cause for arrest, in the grand jury, in prejudicial evidence at trial, and finally in instructions to the jury.

1. The Warnings Given to Petitioner Birch and the Subsequent Questioning Were Not in Compliance with Decisions of this Court.

The government's initial contact with petitioner occurred on December 18, 1970, when B.N.D.D. agents executed an administrative search warrant. Upon presenting the warrant, the agents read Form B.N.D.D. 13-A in order to inform petitioner of his rights. However, the agents neglected to inform petitioner that

he also had a right not to comply with the mandate of the warrant at that time. Any warrant carries with it a powerful inducement to comply, especially when presented by several special agents. However, this particular warrant could only be immediately enforced with petitioner's consent. The agent's failure to so warn defendant coerced defendant into allowing the agents to violate his Fourth Amendment right to be free from unreasonable searches. Therefore, any information or statements received during this illegal search are inadmissible. *Weeks* v. *United States*, 232 U.S. 383 (1914); *Abel* v. *United States*, 362 U.S. 217 (1960). Nor may this information be used to establish probable cause for the arrest.

Even assuming that the warnings were complete, petitioner clearly and unequivocally stated that he did not want to waive any of his rights. When petitioner made this statement, interrogation should have ceased immediately. *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966). See also *Frazier* v. *United States*, 419 F.2d 1161 (D.C. Cir., 1969); *United States* v. *Jenkins*, 440 F.2d 574 (7th Cir., 1971). Instead of complying with petitioner's request, the agents continued to question petitioner at which time petitioner answered questions. This continued questioning in the face of an unequivocal denial of waiver should have at least alerted the agents to a possible misunderstanding which they were then required to clarify before proceeding. *Frazier* v. *United States, supra; United States* v. *Nielson*, 392 F.2d 849 (7th Cir., 1968).

The prosecution used information from the illegal search and invalid waiver to establish probable cause for arrest (see Point 2, *infra*) and to place highly prejudicial material before the jury (see Point 4, *infra*).

2. The Finding that the Arrest was Based on Probable Cause was not in Compliance with Decisions of this Court.

The government lacked probable cause for arrest. The total facts known to the agents for establishing probable cause for petitioner's arrest may be stated as follows. Agents Lore and O'Grady on January 27, 1971, secretly marked bottles of generic drugs which were ordered by defendant from Wolman's Drug Company. The agents then had the bottles packaged in a Wolman's box. After showing the box to other agents, the box was given to United Parcel Service for delivery to defendant's pharmacy. On January 28, 1971, the next day, Agent O'Grady observed petitioner remove a Wolman's box from his store and place it in the back seat of his car. Agent O'Grady could only testify that the box was similar to the one which was marked but could not tell if the box had been opened or if it indeed was the same box. Agent Vigna then observed defendant's son remove a box from the car and carry it into the garage. He couldn't tell if it was the marked box or even the same box that Agent O'Grady saw placed in the car. The next evening, January 29, 1971, agents observed petitioner handing bottles to another man. The bottles were similar to drug bottles, but the agents could not tell from where petitioner was taking the bottles.

The endless series of assumptions which this chain of "observations" requires can hardly be said to fill the standard for probable cause as set out in *Henry* v. *United States,* 361 U.S. 98 (1959) and countless other cases.

First, the agents had to assume that the box carried out of the drug store was the same box they secretly marked. Next, they had to assume that the box had

not been opened and that the contents were still the same. From this, the agents assumed that there were no other boxes in petitioner's car so that the box removed could be said to be the same box which was observed initially. Upon observing bottles being transferred, the agents further had to assume that they were the same bottles which they secretly marked and that the contents of these bottles remained the same. It would, of course, not be unreasonable for a pharmacist to have many surplus bottles and there is no evidence connecting these bottles with any of the boxes.

This chain of events clearly cannot approach that required to establish probable cause. Therefore, the arrest of both petitioner and his codefendant and the resulting evidence must be suppressed. *Henry* v. *United States, supra.*

3. The Allowance of Perjured Testimony in the Form of Unidentified Hearsay Before the Grand Jury is in Conflict with Decisions in the Second Circuit and the First Circuit and is a Recurring Problem Important to the Administration of Criminal Justice.

This Court, in *Costello* v. *United States,* 350 U.S. 359 (1956) held that a grand jury could consider hearsay evidence. The government has taken this holding and extended it beyond all reasonable recognition. In the instant case, the government not only used hearsay evidence as it was entitled to do, but failed to tell the members of the grand jury that the information was hearsay. In fact the grand jury repeatedly asked Agent Lore what *he* observed. Agent Lore answered these questions by stating the alleged facts. Instead of testifying truthfully Agent Lore perjured himself by claiming that these were his own personal observations.

In the grand jury, on February 2, 1971, Agent Lore testified that on January 28, 1971, he maintained a surveillance on Birch's pharmacy, on Birch himself and his travelings; that during this surveillance he and Agent Scott went to a house at 196 Richmond Avenue, Staten Island; that Birch remained at this location for fifty minutes; and that he observed a yellow Corvette parked in the area of 196 Richmond Avenue. Lore's trial testimony established that on January 28 he was not with Agent Scott at 196 Richmond Avenue; and that he never observed a yellow Corvette at 196 Richmond Avenue or anywhere else. It was Agents Scott and O'Grady who allegedly observed the yellow Corvette in this area on January 28; and neither of these Agents could testify at trial that Birch actually went inside 196 Richmond Avenue or any other location in this area.

Agent Lore testified in the grand jury that later that evening of January 28th he observed Birch proceed with a package and his family from the pharmacy to his home. He further observed Birch park his car, get out with his family, and with the assistance of his son, bring the package into the house. Lore made none of these observations except to see Birch leave the pharmacy with his family and a package. It was Agent Vigna, who testified at trial that he made the observations of Birch's arrival at his garage with a package and his family and that he observed Birch's son bring the package into the garage.

Lore also testified before the grand jury that later this same evening of January 28th, he observed a yellow convertible arrive at Birch's residence, saw the driver, Nocerino, get out of the car, go to Birch's front door, talk to someone, return to the car and drive off. In

addition to never seeing the yellow car in this case, it was Agent Vigna, not Lore, who observed a light sports car on this evening, drive into Birch's driveway, saw the driver (unidentified) head toward Birch's front door (never seeing him at the door or speaking with anyone), and 30 or 60 seconds later return to the car and drive off.

Lore further testified in the grand jury that on the evening of January 29, 1971, he actually observed the same yellow sports car drive to Birch's residence and immediately drive off; that later this same evening he observed defendant Nocerino enter Birch's garage, where with the assistance of Birch, he transferred small cartons into a big carton, close the carton, place it into his car and drive off. He did testify to the grand jury that Agents Scott and Klein later told him that the transfer he observed was of large jars.

Lore never observed the transfer of cartons or anything else at Birch's garage; he never observed Birch or Nocerino or anyone else in Birch's garage transferring anything; he never observed Nocerino place a carton in his car and drive off. Lore, at trial testified that he made no observation of Birch's garage on or about 6:00 P.M. on January 29, 1971.

At trial, the government's testimony from Agents Scott and Klein revealed that they were the only agents who made the observations of Birch's garage on this evening of January 29th, and even they could not identify Nocerino as the man in the garage, and only Scott could identify Birch as being in the garage.

Lore also testified in the grand jury that when Nocerino was arrested, he advised Nocerino of his constitutional rights; that Nocerino stated to him that

he understood these rights; and that he wanted to see his attorney.

The facts established at trial reveal that Lore was not with Nocerino at the time of the arrest, never gave him any constitutional warnings, and never asked Nocerino any questions. This was done by other agents.

From Agent Lore's testimony, the grand jury had the right to believe, and were led to believe, that he made direct observations of the commission of the crime and other prior and subsequent material events with the one exception that what he saw transferred in the garage was told him to be large jars by Agents Scott and Klein.

The Second Circuit has itself become painfully aware of this fraudulent practice and has frequently cautioned the government against such abuses threatening to dismiss furture indictments. *United States* v. *Leibowitz,* 420 F.2d 39 (2nd Cir., 1969) and cases cited therein. See also *United States* v. *Gramolini,* 301 F.Supp. 39 D.R.I., 1969). Such warnings have failed to be effective. In *United States* v. *Arcuri,* 405 F.2d 691 (2nd Cir., 1969), the Court stated that it had been informed that this practice of presenting hearsay testimony before a grand jury when firsthand testimony is available would no longer be the policy of the United States Attorney. Yet in the instant case (some two and one half years later), we find that nothing has changed at all.

Judge Weinstein in *United States* v. *Arcuri,* 282 F.Supp. 347 (E.D.N.Y., 1968), *aff'd* 465 F.2d 691, *Cert den.* 395 U.S. 913, traces the evils of this practice.

> The practice—as in the instant case—of relying on hearsay rather than upon the testimony

of eye-witnesses is pernicious for two reasons. First, it habituates the grand jury to rely upon "evidence" which appears smooth, well integrated and consistent in all respects. Particularly because neither cross-examinations nor defense witnesses are available to them, grand jurors do not hear cases with the rough edges that result from the often halting, inconsistent and incomplete testimony of honest observers of events. Thus, they are unable to distinguish between prosecutions which are strong and those which are relatively weak. All cases are presented in an equally homogenized form. A grand jury so conditioned is unable to adequately serve its function as a screening agency. It cannot exercise its judgment in refusing to indict in weak cases where, technically, a prima facie case may have been made out. It is, morever, unlikely to demand additional evidence.

The second reason the practice is undesirable is that it prevents the defendant from utilizing grand jury testimony in cross-examining witnesses who will testify at the trial. *Id.* at 349.

Although *Costello, supra,* held that a grand jury could consider hearsay,

> There is no reason to believe that the Supreme Court in *Costello* intended to encourage the practice before grand juries of deliberately relying solely on the testimony of witnesses without any personal knowledge when better evidence is readily at hand. Rather, *Costello* seems to have been designed to avoid technical failures of indictments because hearsay or other inadmissible evidence was used either inadvertently or because nothing more probative was immediately available. *United States* v. *Arcuri, supra,* at 349.

Further, in *Costello,* this Court refused to exclude hearsay evidence from grand juries because the re-

sulting "preliminary trial to determine the competency and adequacy of the evidence before the Grand Jury" would result in interminible delay. *Id.* at 363.

However, under conditions in the instant case, informing the Grand Jury of the character of the testimony would cause no burden on the government whatsoever.

The injustice committed before the grand jury by the government merits the dismissal of the indictment herein, any other course is to reward, encourage and approve the government's deceitful actions, and to tacitly suggest that perjury by a government agent serves the ends of justice. Such actions rebound to the severe prejudice of a defendant's rights and to the integrity of the judicial process.

The indictment against Birch should be dismissed.

4. The Admission of Highly Prejudicial Evidence Discovered as a Result of an Illegal Search (Point I) and Without any Limiting Instruction is in Conflict with Decisions of this Court and Presents an Important Matter in the Administration of Criminal Justice.

The highly prejudicial evidence must be excluded as it was discovered in violation of the Fourth Amendment rights of Petitioner. See Point I, *supra.*

The trial Court committed prejudicial and reversible error in admitting into evidence proof that appellant Birch ordered 127,000 capsules of depressant and stimulant drugs not in any way connected with the 17,000 capsules charged in the indictment. The Court's ground for the admission was that this evidence was relevant to the issue of whether or not Birch delivered the 17,000 capsules in the normal course of his business as a pharmacist. The trial Court compounded the

error by not instructing the jury at any time as to the limited use of this evidence.

During the course of the government's direct case, the trial court, over the objections of petitioner's counsel, permitted the government to introduce proof into the case that petitioner had ordered 127,000 capsules of depressant and stimulant drugs from two other wholesale drug firms during the period between February 1970 and December 1970. These firms were not the ones involved with the 17,000 capsules charged in the indictment, nor are these 127,000 capsules the source of the 17,000 capsules charged in the indictment.

The trial court's reason for admitting this unrelated evidence was as follows:

> "The relevancy of the evidence, as I see it, its relation to the statement made by the defendant Birch at his pharmacy on December 8 is that he bought no depressant or stimulant drugs from the generic firms and had entirely confined his deliveries to named firms, Town and Berger drugs.
>
> This appears to me to be relevant because it is part of the government's evidence that the dealings in the depressant and stimulant drugs which we are concerned with were not in the ordinary course of the business of the pharmacy."

At the time this evidence was admitted the Court gave no limiting instruction on the reason for its admission or as to its use by the jury. The Court in its charge also failed to instruct the jury on the limited use of this evidence. In fact, at no point in the trial was the jury aware of the purpose of this evidence being in the case.

This was extremely prejudicial error to allow the jury to use this limited evidence for purposes other

than for which it was ostensibly admitted. It was not relevant to any other elements. In addition, it enabled the jury to consider petitioner guilty of the crime charged because they believed he committed a crime with the 127,000 capsules he allegedly ordered. There is no evidence in this case as to how or why these 127,000 capsules were used or disposed of, if they were used at all. The unlimited use of this evidence denied petitioner a fair trial.

The admission of the 127,000 other capsules was sheer prejudice and calculated merely to arouse the jury in their deliberations to be governed by their emotional, and perhaps personal, distaste for the drug trade rather than the evidence in the case. This evidence would also compensate the government's case for any loss sustained from the rather incredible direct eye-witness testimony of agents Scott and Klein.

The admission of this evidence denied petitioner a fair trial.

5. The Failure to Instruct the Jury on Petitioner's Theory of the Case and the Giving of a "Circumstantial Evidence" Instruction Is in Conflict with Decisions of this Court, with all Circuits, and Presents an Important Issue in the Administration of Criminal Justice.

The Bill of Particulars limited the government's proof, as conceded by the prosecutor, to showing that Mr. Birch actually physically hand delivered the pills. It also determined the course of petitioner's defense. *United States* v. *Murray,* 297 F. 2d 812 (2nd Cir., 1962).

At the conclusion of the case the Court stated:

> "I am inclined to think, although again I say it doesn't really matter, I think as a practical matter

that unless the arguments made on behalf of defendants, who make their closing arguments first, take an unanticipated turn which I do not visualize at the moment [and which never came to pass] that the government must be limited by its proof of delivery by Mr. Birch, he supplying the manpower.

> "... *In other words, I do not think the Government is free to argue that the evidence will support a conviction on the basis of the Jury's being satisfied from all the evidence that there was a conscious and intentional transfer of possession by Mr. Birch to Defendant Nocerino, by Mr. Birch's making the material available for him to pick up in the garage.* (Emphasis supplied.)

"I think a second reason for that is one of policy, that the government is in this case so deeply committed to the probity of the testimony of Scott and Klein that to countenance a verdict of guilt beyond a reasonable doubt on the footing that their testimony could be disbelieved by the Jury in favor of a different, though legally equivalent theory of guilt is inautoptical."

Here it is clear beyond any doubt that the Court holds and sets the limits of what the government can argue to the jury, and in essence what ultimately under proper instructions the jury can find; that the government's case stands or falls on the direct eye-witness evidence and testimony of agents Scott and Klein as to physical hand-to-hand delivery of Birch to Nocerino of the box of capsules; and that a verdict of guilt beyond a reasonable doubt on any other legally equivalent theory of guilt would not be countenanced.

At the conclusion of summations but prior to the Court's charge and in accord with the above previous

holding of the Court, petitioner's counsel requested the Court to charge:

> "If you find that the Defendant Birch did not deliver the drugs in a hand-to-hand fashion claimed by the Government, you must find him not guilty of the charge in Count I"

This was not only a proper request in view of the limitations on the government's proof but exactly what the Court had previously held.

This the Court refused to charge stating:

> "No, I will not so charge. The point is not raised by anything that is said in the charge, nothing in the Government's evidence or summation that suggest anything else that the issue in the case on this trial is, was Mr. Birch in the garage with Mr. Nocerino, and did he pass the battles over and that is perfectly plain."

If the issue was perfectly plain, then petitioner was entitled to have "this plain issue" brought to the attention of the jury. *Quercia* v. *United States,* 289 U.S. 466 (1933). It is elementary that a defendant is entitled to a specific instruction on his theory of the case if there is evidence to support it. *2 Wright Federal Practice & Procedure* § 482 n. 20 and cases cited therein. It was their function to determine this issue, and it was the Court's function to make sure that it was "perfecetly plain". Petitioner was asking for no more than was his right in the legal context of this case.

After this refusal by the Court, petitioner's counsel then requested the Court to charge that "if Mr. Birch was not in the garage when this alleged delivery took place that they must acquit him of the charge in the indictment."

This the Court also refused to charge because to so charge would mean that if an essential piece of evidence was disbelieved, one side or the other would lose. In the narrow posture of this case that was what *should* happen. If the jury disbelieved agents Scott and Klein, then Birch, by the Court's own reasoning, would have to be acquitted. Yet the Court refused, to petitioner's prejudice, to charge on this crucial issue. Both requests of counsel were proper and if given would have clarified for the jury just what their deliberations were to encompass, and would have made "perfectly plain" to the jury, that the case hinged on the direct eye-witness testimony of agents Scott and Klein.

In its charge to the jury on the elements of the crime of Count One, the Court stated that the government had to prove as one of the essential elements, beyond a reasonable doubt, "that Defendant Birch delivered the carton of polyethylene bottles exhibit 5, to another person" Here the Court compounded the errors previously committed in refusing to charge as requested by petitioner's counsel. The whole theory of the government's case, as held by the Court, was that Birch made a physical hand-to-hand delivery to Nocerino as testified to by the direct eye-witness testimony of agents Scott and Klein. Yet there is not one word in the Court's charge under this essential element which defines "delivery" or limits its scope to the government's thory of proof. This was a crucial element in the case.

The Court's charge on the types of evidence added further confusion to what was "perfectly plain."

The failure to define what "delivery" meant in this case coupled with the Court's charge on direct and

circumstantial evidence no doubt prompted juror number six to inquire of the Court "whether on Count I on the direct delivery, whether circumstantial evidence will do."

The Court replied:

> "I think one additional matter was raised by a Question of Juror No. 6, which, as I understand it, in substance was: would it be possible to find the defendant guilty under count I through circumstantial evidence of the charged delivery? In this case the government is restricted to establishing that Mr. Birch delivered the depressant and stimulant drugs to Mr. Nocerino before you could convict on count I. In addition to the other elements you would have to be satisfied from all the evidence in the case, beyond a reasonable doubt, that Mr. Birch himself delivered the depressant and stimulant drugs to Mr. Nocerino physically."

This reply begged the question. What the jury wanted to know was whether they were required to find or not find "delivery" on the direct evidence of agents Scott and Klein, the only witness in the case who gave such direct evidence, or could they find a "delivery" circumstantially other than Scott and Klein, by the evidence of the travels of exhibit 5 the box of capsules, the only other route possible.

The issue which was "perfectly plain" to the Court as previously espoused in restricting the limits of the prosecutor's summation and upon which petitioner's counsel made his two requests to charge, turns out to be exactly the opposite. It is obvious that the jury was seeking to determine whether without Scott and Klein's direct eye-witness testimony, they could find a delivery from Birch to Nocerino on circumstantial evidence.

After delivering this supplemental charge, the Court, at the insistence of the prosecutor cleared up any doubt on the use of circumstantial evidence by further instructing the jury to which counsel objected, as follows:

> "Now, when I say you must be satisfied of that from all the evidence in the case, that would include circumstantial evidence as well as other evidence."

Once it became clear that the jury was confused it became imperative that the trial judge take particular care to instruct the jury. *Bollenbach* v. *United States*, 326 U.S. 607 (1945).

This failure to properly instruct the jury was prejudicial error.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

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August 12, 1972

APPENDIX

APPENDIX

1. Copy of order of Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of June, one thousand nine hundred and seventy-two.

Present: Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. James L. Oakes, *Circuit Judges.*

United States of America, *Plaintiff-Appellee,*

v.

Merwin D. Birch and Robert Nocerino, *Defendants,*
Merwin D. Birch, *Defendant-Appellant.*

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, was now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-238

MERWIN D. BIRCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioner, a registered pharmacist, was convicted of having disposed of approximately 17,000 capsules of assorted stimulant and depressant drugs, not in the ordinary and authorized course of his business, in violation of 21 U.S.C. (1964 ed. Supp. V) 360a(b) and 331(q)(2).[1] He was sentenced to three years'

[1] Petitioner was tried with Robert Nocerino, who was convicted and sentenced under the provisions of 18 U.S.C. 4208(b).

imprisonment and fined $2,500. The court of appeals affirmed without opinion (Pet. App.).

On December 18, 1970, an audit of petitioner's pharmacy revealed an extreme shortage in the majority of stimulant and depressant drugs handled by the pharmacy between February and December 1970 (Tr. 414-422).[2] Petitioner was thereafter placed under surveillance by agents of the Bureau of Narcotics and Dangerous Drugs. Two shipments of stimulant and depressant drugs ordered for petitioner's pharmacy in January 1971 were marked for identification by government agents prior to delivery to the pharmacy (Tr. 427-430).[3] On January 28, 1971, petitioner took a box from the pharmacy and placed it in his automobile. This box was "almost identical with the one" (Tr. 475) marked by the agents the previous day and had a "Wolman's" assignment slip on top (Tr. 475-477). Petitioner drove to his home where he directed his son to place the box in the garage (Tr. 525-527). The following day petitioner and co-defendant Nocerino were observed transferring what appeared to be drug bottles from petitioner's garage to Nocerino's automobile (Tr. 586-592). When Nocerino drove away from petitioner's garage, he was arrested. On the front seat of the car was a carton containing approxi-

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[2] "Tr." refers to the transcript of the proceedings at trial.

[3] A January 21, 1971 order with Sherry Pharmaceutical Company was marked with the number 605. A January 27, 1971 order with Wolman's Pharm-Cal Corporation was marked with the number 606.

mately 17 bottles of stimulant and depressant drugs. Thirteen of these bottles were from the shipments previously marked by government agents for identification (Tr. 789-792).

1. Petitioner contends (Pet. 5-6) that he did not knowingly consent to the audit of stimulant and depressant drugs on December 18, 1970, since he was not informed that under the administrative warrant authorizing the audit the agents had no power to search for or seize his records if he refused to produce them. However, under 21 U.S.C. (1964 ed. Supp.V) 360a(d)(2) petitioner was required to keep records of his transactions in stimulant and depressant drugs and the agents were authorized at reasonable times to have access to and copy such records and to inventory the stock of such drugs. Moreover, failure to comply with these inspection obligations was itself punishable under 21 U.S.C. (1964 ed. Supp. V) 331(q)(5) and (6). In short, what this Court recently said in *United States* v. *Biswell*, 406 U.S. 311, 314-315, disposes of the claim made here.

> * * * When the officers asked to inspect respondent's locked storeroom, they were merely asserting their statutory right, and respondent was on notice as to their identity and the legal basis for their action. Respondent's submission to *lawful* authority and his decision to step aside and permit the inspection rather than face a criminal prosecution is analogous to a householder's acquiescence in a search pursuant to a warrant when the alternative is a possible criminal prosecution for refusing entry or a forcible

> entry. In neither case does the lawfulness of the search depend on consent; in both, there is lawful authority independent of the will of the householder who might, other things being equal, prefer no search at all. * * * In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute. [Footnote omitted.]

Petitioner also contends (Pet. 6) that the agents who conducted the audit on December 18, 1970 violated his Fifth Amendment rights by continuing to question him after he stated he did not wish to waive any of his rights. Petitioner did agree, however, to discuss the operation of the pharmacy with the agents after stating that he would not waive his rights, and he told them that he would consult with his brother, who was an attorney with offices above the pharmacy, if it became necessary to do so during the investigation. Since petitioner was not in custody at the time of the audit, there was no reason for the agents to stop their investigation. *E.g.*, *United States* v. *Jaskiewicz*, 433 F. 2d 415, 417-420 (C.A. 3), certiorari denied, 400 U.S. 1021.

2. Petitioner's contention (Pet. 7-8) that there was no probable cause for his arrest is insubstantial. The agents had observed what appeared to be a transfer of drugs in petitioner's garage and the fact that the bottles found in Nocerino's car were the ones previously marked for identification created the probability that petitioner had effected an illegal

transfer of drugs. Moreover, since no seizure of evidence used at trial accompanied petitioner's arrest, an absence of probable cause would not have been a basis for reversal of his conviction. *Johnson* v. *Louisiana*, 406 U.S. 356, 365.

3. Petitioner contends (Pet. 8-13) that the indictment was based on perjured testimony because the agent who testified before the grand jury did not distinguish his personal observations from those observations made by other agents. Specifically, petitioner argues that in response to certain questions asking, "What did you observe?" the agent responded with a narration of petitioner's actions thereby giving the impression that he had personally observed all the reported events when in fact some of the events had been observed by other agents.

Reversal of petitioner's conviction and dismissal of the indictment, as petitioner requests, is not warranted. There is no affirmative duty to inform the grand jury that it is listening to hearsay. *United States* v. *Payton*, 363 F. 2d 996, 999 (C.A. 2), certiorari denied, 385 U.S. 993. Petitioner does not claim that the government deceived the grand jury as to the facts supporting the indictment nor does he suggest any reason why presentation of the other agents before the grand jury might have affected the return of the indictment. See *United States* v. *Olsen*, 453 F. 2d 612, 615 (C.A. 2); *United States* v. *Leibowitz*, 420 F. 2d 39, 42 (C.A. 2). Furthermore, even excluding the portions of the testimony to which petitioner objects, the grand jury could still

have indicted petitioner on the basis of the other evidence it heard.* See *Coppedge* v. *United States*, 311 F. 2d 128, 131 (C.A. D.C.), certiorari denied, 373 U.S. 946; *Gates* v. *United States*, 122 F. 2d 571, 576 (C.A. 10), certiorari denied, 314 U.S. 698.

4. Contrary to petitioner's claim (Pet. 13-15), it was not error to admit into evidence other records establishing that petitioner had misrepresented his purchases of stimulant and depressant drugs to the agents conducting the audit (Tr. 625-633). Evidence of other illegal activities is admissible when probative of an element of the offense being tried. *Nye and Nissen* v. *United States*, 336 U.S. 613, 618; *United States* v. *Warren*, 453 F. 2d 738, 745 (C.A. 2), certiorari denied, 406 U.S. 944; *Love* v. *United States*, 386 F. 2d 260, 266 (C.A. 8), certiorari denied, 390 U.S. 985. In this case, the evidence of unreported drug purchases was probative of the fact that petitioner was dealing in drugs outside the regular course of business; it also evidenced petitioner's intent to violate the law and showed a course of conduct by which the law was being violated. Since petitioner requested no limiting instruction as to the use of this testimony at trial, he cannot assert on appeal that he was prejudiced by lack of such instructions.

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* The testifying agent was an eye witness to the drug audit on December 18, 1970; to the marking of the drug shipment; and to petitioner's removal of the box from the pharmacy to his home (Tr. 414-431). He identified as hearsay the identification of the box as the one from the shipment (Grand Jury Minutes, p. 6).

5. In the government's bill of particulars, the transfer of the drugs was described as a hand-to-hand delivery. Accordingly, the district court noted that the government was limited to proving that petitioner himself supplied the manpower for the delivery and could not rely on the theory that petitioner merely made the drugs available to be taken by Nocerino (Tr. 922-923). Petitioner contends (Pet. 15-20) that the court failed adequately to define the term "delivery" since the court refused to give his requested instruction that:

> If you find that the Defendant Birch did not deliver the drugs in a hand-to-hand fashion claimed by the Government, you must find him not guilty of the charge in Count I. [Tr. 1053.]

In refusing this instruction the court noted that nothing in the government's case suggested a constructive delivery and thus the instruction was unnecessary (Tr. 1053-1054).

The court did charge that the first element of Count I was, "that Defendant Birch *delivered* the carton of polyethyline bottles, Exhibit 5, to *another person*" (Tr. 1067, emphasis supplied). Moreover, in response to a juror's question the court gave the following supplemental instruction:

> * * * In this case the Government is restricted to establishing that Mr. Birch delivered the depressant and stimulant drugs to Mr. Nocerino before you could convict on Count I. In addition to the other elements, you would have to be satisfied from all of the evidence in the case, be-

yond a reasonable doubt, that Mr. Birch *himself* delivered the depressant and stimulant drugs to Mr. Nocerino *physically*. [Tr. 1094-1095, emphasis supplied.]

These instructions plainly required the jury to find a physical delivery from petitioner to Nocerino. Despite this, petitioner argues that by instructing the jury that they could consider circumstantial evidence of the physical delivery of the drugs the court permitted the jury to find a constructive delivery. This contention confuses the nature of the evidence the jury was permitted to consider with the question of fact they were limited to considering. The instructions required the jury to find an actual physical delivery by petitioner, in order to convict, but the jury was properly told that, in determining whether such a personal delivery had taken place, circumstantial evidence could be considered. See *Holland* v. *United States*, 348 U.S. 121; *United States* v. *Bowles*, 428 F. 2d 592, 597 (C.A. 2), certiorari denied, 400 U.S. 928.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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